Supreme Court, U.S.
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No. 10-1084

In The

Supreme Court of the United States

COREY FERGUSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a reasonable possibility that when the staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done in violation of *Brady* and *Giglio*, require a new trial where the Government failed to disclose a § 5K1.1 cooperation agreement of a key witness during trial, in which misleads the jury can be said with confidence that the jury's verdict would have been the same if the jury was made aware of the witness's false testimony.

2. Whether using only the words (harmless error) satisfies Article VI of the United States Constitution under *Chapman v. California*, wherein this Supreme Court commanded, that "to determine whether the error was harmless under *Chapman*" the question this Court must ask is whether, absent the improperly admitted [Evidence], it is clear beyond a reasonable doubt, that the jury would have returned a verdict of guilty.

3. Whether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment.

LIST OF PARTIES

All parties appear in the caption of the case on the Cover.

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1. United States Court of Appeals for the Sixth Circuit, *United States of America v. Corey Ferguson*, No. 08-5712, July 13, 2010, appears at Appendix "A," App. 1, to the petition and was not published.

2. The Judgment of the United States District Court for the Western District of Kentucky *United States of America v. Corey Ferguson*, District Court No. 1:06 CR-24-03-R May 5, 2008, appears at Appendix "B," App. 27, to the petition.

JURISDICTIONAL STATEMENT

The date on which the United States Court of Appeals decided my case was July 13, 2010.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 23, 2010, and a copy of the Order denying Re-hearing appears at Appendix "C," App. 40, to the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, United States Constitution:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.
>
> The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution.

Amendment IV, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V, United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On May 3, 2006, the Defendant was indicted along with nine (9) other individuals for various drug-trafficking offenses and a warrant for his arrest was issued. On July 12, 2006, the Grand Jury returned a superseding indictment charging Ferguson in three counts: (1) conspiracy to manufacture crack cocaine and to distribute powder and crack cocaine from June 1, 2003, to February 17, 2006, in violation of 21 U.S.C. § 846 and to knowingly possess with intent to distribute marijuana, in violation of 21 U.S.C. § 841(A)(1) (Count 1); (2) manufacturing crack cocaine between January 28, 2006 and February 8, 2006, in violation of 21 U.S.C. § 841(A)(1) (Count 17); and distributing powder cocaine on February 1, 2006, in violation of 21 U.S.C. § 841(A)(1) (Count 18). In addition, the Government sought forfeiture of certain items seized pursuant to 21 U.S.C. § 853 (Count 28).

Ferguson filed a motion to suppress the evidence seized from his home during the execution of a state search warrant. He also filed a motion in limine to exclude cash and marijuana seized from his Mt. Lebanon Church Road residence. The district court granted in part and denied in part the motion to suppress, and denied the motion in limine, Ferguson was tried before a jury. The Government presented twelve witnesses, including co-defendants, Jerome Shanklin, the owner of the barber shop, Richard Cox, a barber in the shop, and William Downey, a coconspirator.

The district court submitted six special verdict forms concerning the offenses of conspiracy to manufacture crack cocaine, conspiracy to distribute powder cocaine, conspiracy to distribute marijuana, aiding and abetting in the distribution of crack cocaine and aiding and abetting in the distribution of powder cocaine. The forfeiture count was not considered by the jury. The jury convicted Ferguson of conspiracy to distribute between 500 grams and five kilograms of powder cocaine pursuant to Count 1, and distribution of more than 500 grams of cocaine pursuant to Count 18. The jury acquitted him on Count 17. The district court denied Ferguson's motion for judgment of acquittal or new trial.

Several months after the jury's guilty verdict, the prosecutor informed Ferguson's counsel that the Assistant United States Attorney (AUSA) formerly assigned to the case had made an offer of consideration for trial testimony to Downey. Ferguson filed

another motion for a new trial as a result. The district court denied the motion without a hearing concluding that there was no reasonable probability that the outcome of the jury trial would have been different had the jury and Ferguson known of the offer.

Ferguson also moved for the return of the $5,026 seized from his residence pursuant to the search warrant. The district court denied the motion without a hearing and ordered the monies forfeited. The presentence report calculated Ferguson's guidelines range at 360 months to life imprisonment.

The district court reduced Ferguson's sentence to adjust for the disparity among his codefendants. After considering the 18 U.S.C. § 3553 factors, the court imposed a 300 month sentence. On direct appeal the panel affirmed the judgment of conviction and sentence, but reversed the order of forfeiture. The panel remanded the case for further proceedings consistent with their opinion.

Ferguson filed a timely petition for rehearing and rehearing en banc. The court ordered the Government to respond and then denied the petition for rehearing. Subsequently the defendant requested a stay of the mandate, which was denied. This petition for a writ of certiorari follows:

STATEMENT OF FACTS

Corey Ferguson was charged with conspiracy to distribute crack cocaine, marijuana, and powder cocaine, aiding and abetting in the manufacture of crack cocaine and aiding and abetting in the distribution of powder cocaine. The jury found him guilty of conspiracy to distribute powder cocaine (between 500 grams and 5 kilograms) and aiding and abetting in the distribution of powder cocaine (between 500 grams and 5 kilograms). Ferguson was found not guilty with respect to all charges involving crack cocaine and marijuana. He received a 300 month prison sentence.

Evidence concerning the crack cocaine and marijuana charges consumed a significant part of the trial. In contrast, powder cocaine played a somewhat lesser role. For instance, of the twelve witnesses the government presented at trial, only four testified about powder cocaine deals with Ferguson. Of those four, only one codefendant – William Downey – testified exclusively about powder cocaine transactions. Downey described very specific quantities of powder cocaine purchased from Ferguson during the conspiracy period. Not coincidentally, the total quantity of powder cocaine described by codefendant Downey fell within the quantity range found by the jury.

The charges arose from an investigation by the Bowling Green, Kentucky/Warren County Drug Task Force and ATF which focused on drug trafficking at the Fadz 4 Dayz barbershop in Bowling Green,

Kentucky. The investigation lasted from April 2005 until February 2006. During that time, law enforcement learned that codefendants Jerome Shanklin and Richard Cox, barbers at the Fadz 4 Dayz establishment, were selling crack cocaine, marijuana and powder cocaine from the barbershop. The authorities arrested Shanklin, Cox and two individuals away from the barbershop, William Downey and Antonio Wilson. These are the only individuals who would implicate Ferguson as a powder cocaine dealer.

Shanklin, Cox, Wilson, Downey all eventually agreed to cooperate in exchange for favorable plea agreements. All of the codefendants – with the apparent exception of codefendant, Downey – agreed to testify against Ferguson for a further reduction in their sentence under U.S.S.G. § 5K.1. The sentence hearings for all four men would be conducted after the trial. All of these codefendants-witnesses, with the exception of Downey, testified that Ferguson dealt in marijuana and crack cocaine. Codefendant Downey testified exclusively about powder cocaine.

As for Shanklin, Cox and Wilson, the § 5K.1 cooperation agreement was spelled out in each man's plea agreement. Indeed, the plea agreements were used by the defense to show that each codefendant would get unspecified sentencing consideration depending on their performance at trial.

But Downey's testimony presented a problem for the defense. Unlike the others, codefendant Downey's plea agreement did not include a § 5K1.1 agreement.

Downey's plea agreement also affirmately represented that no other promises had been made: "no other promises or inducements have been made to Defendant in connection with this case." Downey testified that he could not receive a sentence for less than 20 years regardless of his testimony. The government introduced the plea agreement as an exhibit. The government also used the plea agreement on redirect, quite effectively, to counter the suggestion that Downey might receive a sentence less than 20 years anyway.

Downey testified in detail about two specific and large powder cocaine transactions with Ferguson during the conspiracy period. He claimed these transactions occurred around the same time as a February 1, 2006 half-kilo powder cocaine deal described by Shanklin. Downey also described specific quantities involved in each transaction: 12 ounces were purchased through a third party each time (6 ounces went to Downey and 6 ounces went to the third party each time). The total cocaine in the combined transactions equaled approximately 680 grams (within the verdict range of 500 grams and 5 kilograms). Downey testified that the purchase price for each 12 ounce transaction was $8,000. This is consistent with Shanklin's testimony describing the February 1, 2006, half-kilo deal at a cost of $12,000 (a half-kilo equals roughly 17 ounces or 500 grams). Although no evidence confirmed Downey's story, no evidence contradicted it either.

In contrast, Shanklin's and Cox's testimony contradicted each other. Moreover, Shanklin indicated that he had difficulty remembering events because of his outrageous cocaine and marijuana use during this time period. Cox admitted that it was impossible to tell when he was telling the truth as he was just as prone to lie as tell the truth. As for Wilson, he could only say that he purchased relatively small quantities of crack cocaine, powder cocaine and marijuana from Cox on "several" occasions and assumed the drugs come from Ferguson.

There was no physical evidence of any kind linking Ferguson to powder cocaine distribution. Despite an almost year-long investigation – including audio and video wiretaps in the barbershop, pole cameras outside the barbershop, physical surveillance of the barbershop, physical surveillance of Ferguson's home, and codefendants – no one ever saw Ferguson dealing drugs. The case hinged on testimony of codefendants and the seized money and items from Ferguson's home.[1] The jury would either believe

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[1] The Opinion mentions cell phone records and recordings in the barbershop. The recordings actually refer to the name "Ferg." Evidence at trial revealed that Richard Cox kept all of his drugs at the home of Albert Ferguson – an individual unrelated to Corey Ferguson. Albert Ferguson was arrested as a result of this investigation as well. The cell phone records, at best, established calls to or from Jerome Shanklin at the barbershop. The barbershop was also a legitimate business. There is no question that Ferguson, like almost everyone else in the close-knit neighborhood, frequented the barbershop and knew

(Continued on following page)

the codefendants and convict Ferguson or disbelieve them and acquit.

Interestingly, the jury found Ferguson guilty of the charges related to powder cocaine, but found him not guilty of the charges involving crack cocaine and marijuana. Downey's testimony – which elevated above all others based on his unique credibility – affected the outcome as Downey was the only witness to testify exclusively about powder cocaine dealings.

Four months after trial, the government first disclosed its cooperation agreement with Downey. Specifically, "Mr. Downey was informed that he would be considered for a sentence less than 20 years if he testified truthfully during any trial in the matter." The § 5K1.1 agreement was deliberately removed from Downey's initial written plea agreement, apparently at Downey's suggestion, by the first AUSA who handled this case, Brian Butler. Mr. Butler left the U.S. Attorney's Office before Ferguson's trial. Ferguson filed a motion for new trial under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) which was denied. He appealed. A panel affirmed the conviction and sentence, but reversed an order of forfeiture of $5,026.00 seized from Ferguson's residence because the money was illegally seized during an improper search. Op. at 1.

Shanklin. Neither the cell phone records nor the recording proved anything without codefendants' testimony.

Although the money and other evidence should have been suppressed, the panel held that the introduction at trial of over five thousand dollars taken from a modest home in rural Kentucky did not impact the jury's decision in any way. Nor did the introduction of other items taken from or observed in Mr. Ferguson's home: marijuana, shotgun shells, surveillance equipment, a safe deposit key, pictures of Ferguson with celebrities and professional sports stars, and numerous shoe boxes (Shanklin testified at trial that a shoe box was involved in the February 1, 2006 transaction). Indeed, a video of these items was taken while authorities were in Ferguson's house. It was shown to the jury during Detective Sutter's testimony and admitted as evidence. Sutter described each item in detail at trial. The items were highlighted in the government's opening statement. The defense attempted to explain how these items were not related to drug dealing during its proof. The Sixth Circuit Court of Appeals held that the admission of such evidence was harmless error, instead of harmless beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT

Mr. Ferguson was charged with conspiracy to distribute crack cocaine, marijuana and powder cocaine, aiding and abetting in the manufacture of crack cocaine, and aiding and abetting in the distribution of powder cocaine. The district court submitted six special verdicts to the jury. The jury found

Ferguson guilty of conspiracy to distribute powder cocaine (between 500 grams and 5 kilograms) and aiding and abetting in the distribution of powder cocaine (between 500 grams and 5 kilograms), but found him not guilty on the crack cocaine and marijuana charges. The government had no physical evidence that Ferguson actually sold powder cocaine. Despite months of surveillance in an investigation targeting other subjects, Ferguson was never observed selling drugs. The government's case hinged on the presentation of the seized items from Ferguson's home, and on the testimony of codefendants, targeted by the government, who were caught dealing drugs, and who then implicated Ferguson in exchange for lesser sentences.

Only one codefendant/witness – William Downey testified exclusively that he never had a § 5K1.1 agreement with the government, and about powder cocaine transactions with Ferguson in the exact quantity range found by the jury. Two other codefendants and one coconspirator (Shanklin, Cox, and Wilson) implicated Ferguson with regard to powder cocaine too, but they also implicated Ferguson with regard to crack cocaine and marijuana dealings – testimony which the jury disbelieved. Four months after trial, the government revealed that it failed to disclose a (tacit) cooperation agreement with Downey. The government's position was that the staff lawyers in the United States Attorney's office failed to let the left hand know what the right hand had previously done, regarding the (tacit contract) cooperation

agreement with Downey. Unlike Cox, Shanklin and Wilson who testified that they had cooperation agreements, the government had already set the stage for Downey to testify falsely at trial (that he had no such agreement) with the government.[2] The panel held that the agreement was important impeachment evidence, but found that the newly disclosed evidence was not "material" because "Downey was not the key witness" and Shanklin's and Cox's testimony "supports the jury verdict." Op. at 7.

This is at odds with the materiality in *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and *Bell v. Bell*, 460 F.3d 739

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[2] The opinion mentions Shanklin's testimony supports the jury's verdict. Codefendant Shanklin testified on cross examination that Agent Hayes told him that he knew he was lying and hold back stuff. Insincerely, Shanklin changed his testimony and said Agent Hayes said "he knew that he wasn't giving him all the information that he knew." Subsequently, he testified that Agent Hayes never said that he knew he was lying; Shanklin said Hayes only said "he knew he knew more." In addition, Shanklin testified that during his interview with Agent Hayes, he actually said he dealt with Ferguson only on one occasion, and it involved a half a kilo that he sold to Derrick Lander. Subsequently, Shanklin testified that that was a lie because it was more than one occasion. Moreover, insidiously, the AUSA Lawless effectively fashioned Shanklin's lie by saying, "so when you admitted that you lied, you lied by omission?" Shanklin said, "Excuse me?" AUSA Lawless then said "It was a lie by omission. You just didn't tell everything?" Shanklin then said "That's correct." Unfortunately, Shanklin's testimony supports the jury verdict of not guilty and interestingly, the panel failed to distinguish the witnesses' testimony to the verdicts.

(6th Cir. 2006). For example: The Sixth Circuit held in *Bell* that in *Brady v. Maryland*, this court held that the prosecution has a constitutiona' obligation under the due process clause of the fourteenth amendment to disclose exculpatory evidence that is material to either guilt or punishment. 373 U.S. 83, 87, 83, S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The court emphasized that the purpose of such a rule was "avoidance of an unfair trial to the accused." Id. The panel says the Supreme Court has held that the *Brady* rule extends to witness impeachment see e.g. *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within [the] rule." In order to make a *Brady* claim, Petitioner must prove three elements: (1) [T]he evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching"; (2) "that evidence must have been suppressed by the state, either willfully or inadvertently"; and (3) "prejudice must have ensued," *Stricker v. Greene,* 527 U.S. 263, 281-82, 119 S. Ct. 1963, 144 L. Ed. 2d 286 (1999).

Of these three elements, the panel states the Supreme Court has offered the most guidance with respect to prejudice also referred to as materiality. Materiality is established "if there is a reasonable probability that, had the [suppressed] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481

(1985). In *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), this court emphasized four points as to materiality. First, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Id. at 434 115 S. Ct. 1555.

Second, materiality is not a sufficiency of the evidence test, meaning that even if the evidence, including the suppressed exculpatory evidence, is sufficient to support the conviction; a party may still maintain a *Brady* claim. Id. A party makes a *Brady* claim "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 434, 115 S. Ct. 1555. It is the lack of confidence in the verdict, not the ability to support the verdict with the entirety of the evidence that is critical.

Third, "once a reviewing court . . . has found constitutional error there is no need for further harmless error review." Id. By definition, the panel says if it found a *Brady* violation, it would have had to have found a reasonable probability that the result would have differed with the inclusion of the

suppressed evidence. In other words, no *Brady* violation is harmless. Id. at 436, 115 S. Ct. 1555.

Fourth, when the court analyzes materiality the "suppressed evidence [must be] considered collectively, not item by item." Id. This places the attendant burden on the prosecution to look at all potential *Brady* evidence and to determine whether the cumulative effect of such evidence would rise to the threshold level of materiality. Id. at 437, 115 S. Ct. 1555. The panel's ruling is in conflict with *Bell v. Bell*, 460 F.3d 739 (6th Cir. 2006) which creates an odd controversy within the Sixth Circuit. To make matters worse, the panel stated in Bell that the parties raised an interesting question not yet addressed by the Sixth Circuit: whether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment. According to the Sixth Circuit "this is one question that needs to be answered in which the U.S. Supreme Court has not spoken on." Id. at 751.

Petitioner contends it is of constitutional and national importance to have the United States Supreme Court answer the foregoing questions presented because the panel's ruling allows the government to have a contagious escape hatch under *Brady v. Maryland*; *Giglio v. United States*; *Chapman v. California*; *Santobello v. New York*; *Berger v. United States* and *Elkins v. United States* to by-pass the jury, defense team, and Article VI of the United States Constitution all over the United States of America,

when it comes to the following: (1) *Brady* violations derived from false testimony, and the prosecution's failure to disclose that the witness had a § 5K1.1 cooperation agreement. (2) The panel's ruling removes the United States Supreme Court's voice in *Santobello*, 92 S. Ct. at 499 (1971). Wherein this Court stipulated that "the staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done." (3) The panel's ruling is "acid to Article VI of the United States Constitution's words and required oath, when the Federal Government is allowed to use the powers and opportunities of the offices held under its sanctions to nullify its obligations for false testimony, and neutralize it guarantees to secure an unfair trial. The statutory law and constitutional provisions then are of very limited legal force on behalf of some of the accused, and Article VI of the U.S. Constitution becomes in-effect only for the privileged. (4) The panel's ruling suffocates this Court's elegant command in *Berger v. U.S.* in which this Court held that, "The United States Attorney is the Representative not of an ordinary party to a controversy, but of a sovereignty whose obligation, to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows,

he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." 79 L. Ed. 1314 (1935).

(5) and (6), given the heavy reliance on police and codefendant testimony, the panel's ruling now allows the government to introduce testimony regarding illegally obtained items taken from the accused's home to portray him as a typical drug dealer before the jury. The items in this case included $5,026 in cash, a safe deposit key, marijuana, shotgun shells, surveillance equipment, pictures of the Defendant with celebrities at various professional sporting events, and numerous shoe boxes. Agent Sutter testified in detail about these items and Shanklin testified that a shoe box was involved in a powder cocaine deal. Although the panel noted the facts supporting probable cause for the search were "scant" and that items allegedly in "plain view" were illegally seized, the panel held that the admission of such bolstering evidence was "harmless error." Op. at 11. This conflicts with the standard set forth in *Chapman v. California*, 386 U.S. 18 (1976). In addition, it removes the legal command of this court's voice in *Elkins v. United States*, 364 U.S. 206, in which this court held "any proceeds of a state action violation of a Defendant's constitutional rights cannot be used in Federal Court, in spite of the fact that the illegal search/seizure was done as a state action.

Petitioner contends the panel's ruling will have a contagious impact on the character of the admissibility of evidence and fair trial, if the only evidence needed to be displayed before the jury is testimony from an alleged codefendant who faces as much time as the accused, and the subjective testimony of officers regarding illegally seized items and money.

For all of the above reasons this court should address the "3" questions presented on Page 1 of this petition.

ARGUMENT

I. *Brady* and *Giglio* required a new trial where the Government failed to disclose a § 5K1.1 cooperation agreement with a key witness, William Downey, and elicited false testimony from Downey at trial.

A. The *Brady* violation

The government stipulated to all elements of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) except for materiality. (R.451, Memorandum Opinion). The panel acknowledged that the government's cooperation agreement with codefendant Downey was favorable impeachment evidence for the defense which should have been disclosed. Op. at 5. However the panel found that Downey had "no direct deals" with Ferguson, and Shanklin's and Cox's testimony "supports the verdict." Op. at 6-7. Essentially, because the undisclosed evidence did not touch Cox and

Shanklin's testimony, the cooperation agreement with Downey was found to be immaterial under *Brady*. This is an incorrect interpretation of *Brady*.

Favorable evidence is material for *Brady* purposes if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). To determine reasonable probability, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). *Brady* materiality is not a sufficiency-of-the-evidence test. *Kyles*, 514 U.S. at 434. The withheld evidence need not touch every prosecution witness and every item of incriminating evidence before materiality is satisfied. The impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others. Id. at 445 (citing *United States v. Agurs*, 427 U.S. 97 (1976)).

As such, the Sixth Circuit has concluded that withheld evidence satisfies materiality where its disclosure would have left several prosecution witnesses completely unscathed. For instance, in *Castleberry v. Brigano*, 349 F.3d 286 (6th Cir. 2004), the panel held that three items of suppressed evidence, when evaluated collectively, "strongly support[ed] the conclusion that Castleberry's trial did not produce an outcome worthy of confidence," thus satisfying *Brady*

materiality. 349 F.3d at 292. In reaching this conclusion, the panel acknowledged that some testimony of witnesses present at the scene of the crime would not have been contradicted by the withheld evidence. Id. at 294. Nevertheless, the panel acknowledged, "[t]he key question is not whether the state would have had a case to go to the jury if it had disclosed the favorable evidence, but whether they can be confident that the jury's verdict would have been the same." Id. (quoting *Kyles*, 514 U.S. at 453).

In addition, it is imperative that jurors fully appreciate the "serious questions of credibility informers pose." *Banks v. Dretke*, 540 U.S. 668, 701-702 (2004) (citations omitted). Here, there is a reasonable probability that, had Downey's § 5K1.1 cooperation agreement been available, the jury's verdict would not be the same. Downey was the only witness to testify exclusively about powder cocaine transactions. The quantities described by Downey were in the range found by the jury. Downey was the only codefendant/witness without a § 5K1.1 agreement. Thus, unlike the other witnesses, Downey appeared to have no incentive to lie. He could not receive less than a 20-year sentence no matter what he said. This made Downey uniquely credible in the eyes of the jury.

The conclusion is confirmed by the jury verdict itself. Shanklin, Cox and Wilson testified about marijuana and crack cocaine transactions with Ferguson. The jury found Ferguson not guilty of those charges. Simply, it is unreasonable to assume that the jury believed these men with regard to

powder cocaine – completely independent of Downey's testimony – but refused to believe the same codefendants with regard to the marijuana and crack cocaine transactions. Given Downey's unique credibility in the eyes of the jury, as demonstrated by the guilty and not guilty verdicts, reversal and remand for a new trial is required under *Brady*.[3]

B. The *Giglio* violation

Even assuming *Brady* materiality is not met, the government knowingly allowed codefendant Downey to testify that he had no cooperation agreement. A more defense-friendly standard applies to a knowing-presentation-of-false-testimony claim. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Rosencrantz v. Lafler*, 568 F.3d 577, 583 (6th Cir. 2009). Where the government knowingly presents false evidence, a new trial is warranted "if there is any reasonable likelihood that the false testimony could

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[3] The panel in *Morrow v. Dretke*, 367 F.3d 309 (5th Cir. 2004) states . . . a prosecutor must disclose evidence favorable to an accused if it "is of sufficient significance to result in the denial of the defendant's right to a fair trial." It is material if there is a reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different. Rather, it is whether given the non-disclosures of material evidence the verdict is less worthy of confidence. In defining the scope of the duty of disclosure, the Fifth Circuit says, "it is no answer that a prosecutor did not have possession of the evidence or that he was unaware of it." Rather, the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case.

have affected the judgment of the jury." Id. (citing *Agurs*, 427 U.S. at 104; *Giglio*, 405 U.S. at 154). The panel in this case held this standard did not apply because "Downey was not the key witness against Ferguson" and there was no indication that the trial prosecutor (AUSA Lawless) knew about the agreement and thus did not know that Downey testified falsely. Op. at 7.

Taking the points in reverse order, *Giglio* does not require actual knowledge on the part of the specific prosecutor who tries the case. Indeed, in *Giglio*, the prosecutor who made the promise of leniency to the government witness, Taliento, was not the same prosecutor who tried the case. At trial, Taliento falsely testified that he had no agreement. The prosecutor who tried the case claimed to have no knowledge of the agreement. Nevertheless, this Court found that the *government* knowingly presented false testimony. This Court noted: "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." *Giglio*, 405 U.S. at 154. Had AUSA Butler questioned Downey at trial, this would clearly be a knowing-presentation-of-false-testimony situation. But Butler's knowledge is imputed to the government under *Giglio* and, ultimately, it is the government who prosecutes the case and calls witnesses.

The government's knowledge is not diminished simply because it selects a different prosecutor at trial.

On the remaining point, the materiality issues in the *Brady* context apply with even greater force under *Giglio*. The jury convicted Ferguson on only powder cocaine charges. Codefendant Downey was the only witness to testify exclusively about powder cocaine transactions. The quantities Downey described were the exact amounts found by the jury. Downey was the only codefendant/witness without a § 5K1.1 agreement at trial. As recognized by the panel, false testimony is immaterial only if a court can "say that no reasonable jury could have been affected by the undisclosed information." *Rosencrantz*, 569 F.3d at 587 (citations omitted). In other words, one must be confident that the jury's decision-making process would not have been affected if the jury had known that Downey lied on the stand about the cooperation agreement. As the panel recently recognized, under *Giglio* friendly-to-the-accused-standard, "in most cases involving perjury or its equivalent [the result will likely be] a finding of constitutional error." Id. 569 F.3d at 587 (citing *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995)).[4]

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[4] *Rosencrantz* involved a habeas claim. As such, *Rosencrantz* turned on the harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993) which is not at issue in this case.

There is simply no way to discount Downey's cooperation agreement as immaterial under the *Giglio* standard. As such, a new trial is required for this separate reason as well.

II. It was not harmless error for the trial court to admit illegally seized items taken from or observed in Mr. Ferguson's home at trial, which was not found to be harmless beyond a reasonable doubt.

Before trial Ferguson moved to suppress all items seized from his home at the Mt. Lebanon Church Road address because (1) there was no nexus between the address and the criminal activity to support probable cause for the search warrant; (2) the affidavit contained false statements; (3) items taken outside the scope of the search warrant were not of an immediately apparent incriminating nature.

Taking the issues in reverse order, the panel found the items seized from Ferguson's home outside the search warrant ($5,026 in cash, four surveillance cameras, and a JVC television) were illegally seized as they were not in plain view. With respect to the search warrant and the search of the residence itself, the panel found that the facts connecting criminal activity to the Mt. Lebanon Road address were "scant" and the affidavit in support of the search warrant appeared to contain false information.

However, the panel did not reach the issues of whether the search was illegal because "[g]iven the

overwhelming evidence of Ferguson's guilt on the cocaine charges, any error was harmless here." Op. at 11. As an initial matter, Ferguson's "guilt" on the cocaine charges was no more "overwhelming" than the proof supporting the marijuana and crack cocaine charges (it was all based on codefendant testimony) – the jury acquitted on those charges.

With regard to harmless constitutional error, the government bears the burden of proving that such constitutional error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

If there is reasonable probability that the evidence complained of contributed to the conviction, then the error cannot be considered harmless. Id. "To determine whether the error was harmless under *Chapman* the question the Appeal Courts must ask is whether, absent the improperly admitted [evidence], it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *United States v. Wolf*, 879 F.2d 1320, 1324 (6th Cir. 1989).

Here, the government failed to meet this burden. The following items were taken from or observed in Mr. Ferguson's home: $5,026 in cash, marijuana, shotgun shells, surveillance equipment, a safe deposit key, pictures of Ferguson with celebrities and professional sports stars, and numerous show boxes (Shankin testified at trial that a shoe box was involved in the February 1, 2006 transaction). With regard to the $5,026, the district court judge who

presided over the trial made this observation: "[i]t is incongruous that Ferguson would have such a large amount of cash on hand considering his level of income and his holdings." There is no reason to believe the jury saw the cash or other high-value items, found in Ferguson's modest rural Kentucky home, any differently. This is why the government introduced a video of the items in Ferguson's house recorded during the search. The government showed this video to the jury during Detective Sutter's testimony. Sutter described each item in detail at trial. The items were also highlighted in the government's opening statement. The defense attempted to explain how these items were not related to drug dealing during its proof.

While the items did not relate to powder cocaine distribution specifically, they were effective tools used by the government to show that Ferguson was a drug dealer of one sort or another. In a case where the proof fell on the backs of codefendant/witnesses who testified in exchange for lesser sentences, physical evidence from Mr. Ferguson's home showed a lifestyle at least consistent with drug dealing. The admission of Sutter's subjective testimony, the video, and the items seized were not actually found to be harmless beyond a reasonable doubt under *Chapman*, 386 U.S. 18 (1976). Instead the panel simply said: "Nevertheless, we need not decide whether the search warrant is valid." Given the overwhelming evidence of Ferguson's guilt on the cocaine charges, any error was harmless here. Op. at 11. Unfortunately before a

federal constitutional error can be held harmless, this court says the lower courts must be able to declare a belief that it was harmless beyond a reasonable doubt. See the following cases in which the Sixth Circuit and other circuits were able to declare a belief that the evidence complained of might have contributed to the conviction was harmless beyond a reasonable doubt: *Rosenthal v. Henderson*, 389 F.2d 516 (6th Cir. 1968); *U.S. v. Beard*, 381 F.2d 327 (6th Cir. 1967); *U.S. v. Triana*, 465, F.3d at 326 (6th Cir. 2006); *U.S. v. McGee*, 529 F.3d 697 (6th Cir. 2008); *Hereford v. Warren*, 536 F.3d at 532 (6th Cir. 2008); *Burton v. Bergman*, 649 F.2d at 434 (6th Cir. 1981); *Perkins v. Herbert*, 596 F.3d at 173 (2nd Cir. 2010); *U.S. v. Moreland,* 604 F.3d 1076 (6th Cir. 2010); *U.S. v. Rodriquez-Valez*, 597, F.3d 45 (1st Cir. 2010); *U.S. v. Stever*, 603 F.3d 757 (9th Cir. 2010). The foregoing cases all conflict with the panel's improper, inputted and substitution of the words harmless error, "instead of being able to declare a belief that it was harmless beyond a reasonable doubt." In other words, the panel actually failed to recite the *Chapman* standard or even apply the standard (Id. the panel's opinion). Because the panel could not say that the cumulative *Chapman* error was harmless beyond a reasonable doubt, the Court should reverse and remand with instructions for a new trial. In addition, this Court should address this issue on its own behalf for the lower courts and the Nation, because the words,

harmless error are not being bound by the law or Constitution as required by Article VI.

CONCLUSION

The Fathers of the United States Constitution in their search for fundamental fairness saw fit to demand an oath of loyalty through Article VI of the United States Constitution by their prerequisite phrase:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.
>
> The senators and representatives before mentioned and the members of the several state legislators and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution.

In the case at bar, the panel made an about-face interpretation of *Chapman* and affirmed an otherwise unfair trial. Therefore, since it was the government's decision to use the methods advocated at trial, the evidence seized and used from Ferguson's home should not have been deemed as "harmless," without

a finding of harmless beyond a reasonable doubt. Furthermore, the evidence on which the panel based their interpretations does not come to neatly evaluated collectively. In addition, it seems as certain as anything can be in human affairs that the general decision not to be bound by the laws and Constitution (particularly in this case) constitutes a necessary condition for the granting of this petition for a Writ of Certiorari.

Moreover, Downey's testimony and the evidence seized from Ferguson's home stands inside the main tradition of Government's thought to seek a conviction. He testified and spoke of Ferguson the same way. In addition, the government was mostly concerned with problems of definition, and with deriving Downey's testimony from these definitions. They part such questions as: Was Ferguson his source of supply? What kind of drugs he purchased from Ferguson? How much he paid for the drugs? Did he purchase powder cocaine from Ferguson? Those purposes seemed to them to flow from the nature and present theory of their case. They therefore, also asked questions about the evidence seized from Ferguson's home? This last question was, in the government's eyes equivalent to asking, what are Ferguson's intentions for himself? The monies, marijuana, shotgun shells, surveillance equipment in Ferguson's home; a safe deposit key, pictures of Ferguson with celebrities and professional sports stars, and numerous shoe boxes, derived, ultimately, from these intentions of Ferguson from the limitations of human reason as a requirement by Ferguson.

As a result, the government's theory was rooted in Downey's testimony and the seized evidence from Ferguson's home, and sought to explain the evidence and testimony of Downey and the limits of that testimony and evidence by reference to the will of Ferguson and the nature of his intentions. These definitions were answers to the jury.

Therefore, Petitioner respectfully requests that this United States Supreme Court find it appropriate to put on its armor of protection and grant this writ.

Respectfully submitted,

This the 17th day of February, 2011.

Pro-se Litigant COREY FERGUSON
FEDERAL CORRECTIONAL INSTITUTION
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APPENDIX A

NOT FOR FULL-TEXT PUBLICATION
File Name: 10a0423n.06

No. 08-5712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY**
Plaintiff-Appellee,	
v.	
COREY FERGUSON,	
Defendant-Appellant, /	**(Filed Jul. 13, 2010)**

BEFORE: SUHRHEINRICH, COLE and GILMAN; Circuit Judges.

SUHRHEINRICH, Circuit Judge. Defendant Corey Ferguson appeals his jury conviction and sentence for conspiracy and distribution of cocaine. He also appeals the forfeiture of $5,026.00 seized from his residence. We AFFIRM Ferguson's conviction and sentence, but REVERSE the order of forfeiture.

I. Background

In 2003, the Bowling Green/Warren County Drug Task Force and Bureau of Alcohol, Tobacco, Firearms, and Explosives began investigating the Fadz 4 Days Barber Shop in the Bowling Green, Kentucky area for

drug-trafficking activity. On May 3, 2006, Ferguson was indicted along with seven other individuals for various drug-trafficking offenses and a warrant for his arrest was issued. On July 12, 2006, the grand jury returned a superseding indictment charging Ferguson in three counts: (1) conspiracy to manufacture crack cocaine and to distribute powder and crack cocaine from June 1, 2003, to February 17, 2006, in violation of 21 U.S.C. § 846, and to knowingly possess with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count 1); (2) manufacturing crack cocaine between January 28, 2006, and February 8, 2006, in violation of 21 U.S.C. § 841(a)(1) (Count 17); and distributing powder cocaine on February 1, 2006, in violation of 21 U.S.C. § 841(a)(1) (Count 18). In addition, the Government sought forfeiture of certain items seized pursuant to 21 U.S.C. § 853 (Count 28).

Ferguson filed a motion to suppress the evidence seized from his home during the execution of a state search warrant. He also filed a motion in limine to exclude cash and marijuana seized from Ferguson's Mt. Lebanon Church Road residence. The district court granted in part and denied in part the motion to suppress, and denied the motion in limine. Ferguson was tried before a jury. The Government presented twelve witnesses, including codefendants Jerome Shanklin, the owner of the barber shop, Richard Cox, a barber in the shop, and William Downey, a cooperating individual. The district court submitted six special verdict forms concerning the offenses of conspiracy to manufacture crack cocaine, conspiracy to

distribute powder cocaine, conspiracy to distribute marijuana, aiding and abetting in the distribution of crack cocaine, and aiding and abetting in the distribution of powder cocaine. The forfeiture count was not considered by the jury. The jury convicted Ferguson of conspiracy to distribute between 500 grams and five kilograms of powder cocaine pursuant to Count 1, and distribution of more than 500 grams of cocaine pursuant to Count 18. The jury acquitted him on Count 17. The district court denied his motion for judgment of acquittal or new trial.

Several months later, the prosecutor informed Ferguson's counsel that she recently learned that the Assistant United States Attorney (AUSA) formerly assigned to the case had made an offer of consideration for trial testimony to Downey. Ferguson filed another motion for a new trial as a result. The district court denied the motion without a hearing, concluding that there was no reasonable probability that the outcome of the proceedings would have been different had Ferguson known of the offer.

Ferguson also moved for return of $5,026 seized from his residence pursuant to the search warrant. The district court denied the motion without a hearing and ordered the monies forfeited.

The presentence report calculated Ferguson's guidelines range at 360 months to life imprisonment. The district court reduced Ferguson's sentence to adjust for the disparity among his codefendants. After

considering the 18 U.S.C. § 3553(a) factors, the court imposed a 300-month sentence.

This appeal follows.

II. Analysis

A. New Trial Motion

Ferguson argues that the district court erred in refusing to grant him a new trial pursuant to Fed. R. Crim. P. 33 based on the government's failure to disclose its cooperation agreement with Downey. This Court reviews the district court's decision to deny a motion for new trial based on newly discovered evidence or *Brady* violations for abuse of discretion. *United States v. White*, 492 F.3d 380, 408 (6th Cir. 2007).

Brady v. Maryland requires the government to turn over evidence favorable to the accused and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes evidence that could be used to impeach the credibility of a witness. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *Schledwitz v. United States*, 169 F.3d 1003, 1011 (6th Cir. 1999). Not every failure to disclose favorable evidence requires a new trial, however. *Schledwitz*, 169 F.3d at 1011. Favorable evidence must be material, "and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). *See also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). This means that the defendant must show that the new evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. *See also Bell v. Bell*, 512 F.3d 223, 236-37 (6th Cir. 2008) (en banc) (same), *cert. denied*, 129 S. Ct. 114. In the context of impeachment evidence, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' the nondisclosure of evidence affecting credibility falls within" the *Brady* rule requiring a new trial. *Giglio*, 405 U.S. at 154. The good faith or bad faith of the government is irrelevant in a *Brady* analysis. *Brady*, 373 U.S. at 87; *see also United States v. Agurs*, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor."); *White*, 492 F.3d at 409 ("It matters little whether the government suppresses the evidence out of oversight or guile.").

At trial, the Government introduced Downey's plea agreement, which explicitly stated that "[n]o other promises or inducements have been made" to Downey below the twenty-year minimum in exchange for his testimony against Ferguson. However, four months after his conviction, AUSA Jo Lawless, the trial prosecutor, sent Ferguson's counsel a letter disclosing for the first time that the former AUSA assigned to the case, Brian Butler, agreed to consider

Downey for a sentence less than twenty years if he testified truthfully during any trial (the "cooperation agreement"). According to Lawless, Butler had also agreed to exclude the cooperation agreement from the written plea agreement. Ferguson had requested such *Brady* material prior to trial. At Downey's sentencing, which was held after Ferguson's conviction, the Government moved to reduce Downey's sentence below twenty years consistent with the cooperation agreement, and the district court reduced Downey's sentence to eighteen years.

Downey testified at trial that nothing in the plea agreement promised him a sentence of less than twenty years. On cross-examination, Downey acknowledged that he was looking at a mandatory minimum of twenty years, but that he was testifying in hopes of getting a sentence below twenty years based on a U.S.S.G. § 5K1.1 reduction. On re-direct, Downey testified that the plea agreement contained no promise of a § 5K1.1 motion.

The cooperation agreement is inconsistent with the written plea agreement's statement that "[n]o other promises or inducements have been made to Defendant in connection with this case." The cooperation agreement therefore was impeachment evidence. However, Downey's reliability was not "determinative of guilt or innocence," so a new trial was not required under *Giglio*. Downey was only one of twelve government witnesses, six of whom testified concerning their knowledge of Ferguson's drug dealing. Although Downey testified that he was involved in two powder

cocaine transactions with Ferguson in January 2006, Downey unlike several others, had no direct drug deals with Ferguson, but dealt only through a middleman.

On the other hand, Shanklin, who comes the closest to being characterized as a "key witness" in this case, testified that he received cocaine directly from Ferguson three times – one half kilo and then one kilo in January, and another half kilo on February 1, 2006. The jury viewed videotapes and cellular telephone records that corroborated Shanklin's description of the February 1 incident. The jury found Ferguson guilty of Count 18 (the February 1, 2006 transaction) as well as the conspiracy charge for that time period. Shanklin's testimony supports the jury's verdict here. *Cf. Harris v. Lafler*, 553 F.3d 1028, 1033 (6th Cir. 2009) (holding that the state's failure to disclose in a murder trial three statements police made to its key witness, including a promise that he would be released if he implicated the defendant, was material under *Brady* where the witness "was the key witness for the prosecution" who gave an eyewitness account that was the only evidence that directly linked the defendant as the gunman); *see also id.* at 1034 (noting that "[c]onsiderable authority from the Supreme Court and our court indicates that a defendant suffers prejudice from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness").

Ferguson also argues that the evidence in question could have been used to impeach Shanklin and

Cox because all of the informant-witnesses entered into plea agreements containing the same language as paragraph 20 of Downey's plea agreement. This argument is unavailing because both Cox and Shanklin testified that the possibility of a § 5K1.1 motion appeared in their plea agreements. In short, the district court did not abuse its discretion in denying Ferguson's motion for a new trial based on the undisclosed impeachment evidence.

Ferguson also claims that a new trial is required because the Government knowingly relied on perjured testimony at trial. A relaxed standard applies in cases where the prosecution knowingly uses perjured testimony. *United States v. O'Dell,* 805 F.2d 637, 641 (6th Cir. 1986) (citing *Bagley,* 473 U.S. 667 at 678). In such a case, "the conviction will be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* (quoting *Bagley,* 473 U.S. at 678).

But a new trial is not required under this standard either. As stated, Downey was not the key witness against Ferguson. *Cf. Giglio,* 405 U.S. at 154-55 (holding that a new trial was required after former AUSA failed to disclose to the trial prosecutor that he promised a key witness that the witness would not be prosecuted if he cooperated and the government's case depended almost entirely on that witness's testimony). As also stated above, Shanklin's, as well as Cox's testimony, easily supports the jury's verdict. Thus, it cannot be said that there was "any reasonable likelihood that the false testimony could have

affected the judgment of the jury." *Rosencrantz v. Lafler,* 568 F.3d 577, 584, 589 (6th Cir. 2009) (internal quotation marks and citation omitted), (holding that the uncorrected false evidence by key prosecution witness denying pretrial meeting with the prosecutor would likely fail to "substantially influence" the jury verdict given witness's consistent identification of the defendant, and the impeachment evidence already in the record), *cert. denied,* 78 U.S.L.W. 3642 (U.S. May 3, 2010).

Nor is there any indication that AUSA Lawless knew of the promise to consider a departure at the time of trial such that it could be said she *knowingly* used perjured testimony. Indeed, it is she who brought the cooperation agreement to Ferguson's attention. *Cf. Napue v. Illinois,* 360 U.S. 264 (1959) (holding that where the murder prosecution against the petitioner was based principally on the testimony of a witness who falsely testified that he had received no promise of consideration in return for his testimony, and the prosecutor knew this but did nothing to correct it, a new trial was required because the jury's estimate of his testimony might have been determinative of guilt or innocence); *Schneider v. Estelle,* 552 F.2d 593 (5th Cir. 1977) (new trial required where the state's chief witness, a police officer, knowingly testified falsely at trial).

A hearing was not necessary. *United States v. White,* 492 F.3d 380 (6th Cir. 2007), does not support Ferguson. There, the defendants were deprived of a number of documents they alleged contained exculpatory

information. *Id.* at 413. This court held that the defendants were entitled to an evidentiary hearing because "the supporting evidence detailed the government's rather great lengths to deny Defendants access to the requested documents," which "effectively foreclosed [the defendants] from making the requisite showing that the documents were material and favorable . . . and that the suppression prejudiced them." *Id.* By contrast, the trial prosecutor here, AUSA Lawless, disclosed the information as soon as she discovered it. *United States v. Frost,* 125 F.3d 346 (6th Cir. 1997), is equally distinguishable. There, we held that an evidentiary hearing was necessary because it was unclear from the record whether the testimony of a government expert who was not called could have established that the defendant, who had been charged with mail fraud in connection with an alleged scheme to defraud the government of tuition, actually engaged in common billing practices which would have negated an intent to defraud. *Id.* at 383-84. Here, no further inquiry was necessary because the Government disclosed the *Brady* material, and the district court was able to assess the impact of the violation on the jury verdict.

In sum, then, the district court did not abuse its discretion in denying Ferguson's motion for new trial or in denying his request for an evidentiary hearing.

B. Motion to Suppress

Ferguson claims that the evidence obtained at the Mt. Lebanon Church Road address should have been suppressed because (1) there was no nexus between the address and the criminal activity to support probable cause for the search warrant, (2) the affidavit contained false statements, and (3) the items taken outside the scope of the search warrant were not of an immediately apparent incriminating nature.

Detective Craig Sutter, an officer who was assigned to the drug task force involved in the investigation, stated in his affidavit in support of the application for the search warrant of the Mt. Lebanon Church Road residence that he and several officers arrived at 2946 Mt. Lebanon Church Road, Bowling Green, Kentucky, at approximately 8:30 a.m., on May 15, 2006, to execute a federal arrest warrant for Ferguson. Sutter knocked on the front door, but no one answered. Sutter heard music coming from the residence and saw someone peer through the blinds of a front window. Sutter also observed two pieces of mail bearing Ferguson's name in plain view inside a black Ford Explorer associated with Ferguson that was parked in the driveway. The officers waited approximately forty-five minutes before leaving.

The affidavit further stated that at about 10:10 a.m., dispatch received a phone call from Corey Ferguson's neighbor at 3013 Mt. Lebanon Road, and that "[t]his neighbor *advised that she saw Corey Ferguson* leave 2946 Mt. Lebanon Road in a red

Dodge pickup truck that was towing a trailer." (Emphasis added.) Sutter attested that at 10:17 a.m. another trooper stopped the red pickup and that Corey Ferguson was in this vehicle. The trooper placed Ferguson under arrest, and during a search incident to arrest, the trooper found a 12 gauge shotgun shell in Ferguson's pants pocket. The affidavit noted that Ferguson was a convicted felon, and that the affiant knew Ferguson to be engaged in drug trafficking. Lastly, Sutter stated that based on his experience and training, he knew that drug traffickers are frequently armed and often maintain firearms in their homes.

A Kentucky state-court magistrate judge issued a search warrant for the Mt. Lebanon Road residence. It authorized the officers to seize "12 gauge shotgun shells, [a] 12 gauge shotgun, [and] documentation regarding the purchase of a 12 gauge shotgun." While executing the search warrant, the officers seized $5,026 in cash, five shotgun shells, one baggie of marijuana, a safe deposit key, various documents, four rifle rounds of ammunition, four surveillance cameras, and a JVC television.

The district court concluded that the warrant was valid because "the discovery of Ferguson's illegal possession of ammunition minutes after leaving the residence at 2946 Mt. Lebanon Church Road established probable cause to believe that additional evidence of his possession of firearms or ammunition would be found in that residence."

"In reviewing a district court's denial of a motion to suppress evidence, this court reviews the district court's findings of fact for clear error, and its legal conclusions *de novo*." *United States v. Gillis*, 358 F.3d 386, 390 (6th Cir. 2004). Any error is subject to harmless-error review. *United States v. Garcia*, 496 F.3d 495, 512 (6th Cir. 2007) (citing *Chapman v. California*, 386 U.S. 18, 22 (1967); Fed. R. Crim. P. 52(a)).

The district court's conclusion that the state search warrant was valid is problematic. First, as Ferguson points out, possession of ammunition by a felon is not in fact illegal under Kentucky law. Sutter conceded this at the suppression hearing. Yet the Government relies in its brief on Ferguson's "illegal possession of ammunition" in justifying the validity of the search warrant. Second, the neighbor did not actually identify Ferguson as the individual who left the Mt. Lebanon residence. Rather, the testimony at the suppression hearing revealed that the neighbor simply told the dispatcher that a black male entered a red pickup truck. Thus, Sutter's statement in the affidavit was not accurate. This inaccuracy is material because it was the key fact connecting Ferguson to the residence during the relevant time period, and therefore linking the shotgun shell to the suspected possession of firearms in the residence. In addition, Sutter testified at the suppression hearing that he had not conducted surveillance on the Mt. Lebanon residence, and both he and Special Agent Hayes testified that they had no direct evidence that Ferguson was dealing drugs out of this residence. Sutter

also stated that he had no information that Ferguson kept firearms in his home.

In short, the facts connecting criminal activity to the Mt. Lebanon Road residence are scant. Probable cause for the search could have been based only on the factual predicate that Ferguson left this residence and minutes later was found with a shotgun shell in his pocket. However, the affidavit did not conclusively establish that the black man that the neighbor saw leaving the Mt. Lebanon residence in a red truck was Ferguson.[1] Although law enforcement were probably justified in drawing the inference that the "black man" was indeed Ferguson, this inference should have been revealed to the magistrate judge so that the judge could make an independent determination of probable cause rather than merely rubber stamping the conclusions of Sutter.

Nevertheless, we need not decide whether the search warrant was valid. Given the overwhelming evidence of Ferguson's guilt on the cocaine charges, any error was harmless here. *See Garcia,* 496 F.3d at 512-13 (holding harmless erroneous admission of

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[1] Even if this proposition were conclusively established, it would not necessarily equal probable cause. *See United States v. McPhearson,* 469 F.3d 518, 524-25 (6th Cir. 2006) (rejecting the government's argument that the defendant's arrest outside his residence with drugs on his person was sufficient to establish probable cause because it assumed that the defendant was likely to have stored drugs in that same residence; additional facts were needed to support such an inference).

items not listed in search warrant whose illegality was not immediately apparent because of abundant evidence to convict defendant of drug trafficking conspiracy).

Concerning the items seized, the parties agree that the cash, the safe deposit key, the four surveillance cameras, and the JVC television were outside the scope of the search warrant.[2] The Government maintains that these items nonetheless were properly seized under the plain-view exception to the warrant requirement. "Seizing items beyond the scope of a warrant's authorization violates the Fourth Amendment rights of the subject of a search." *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 554 (6th Cir. 2003) (citing *Andresen v. Maryland*, 427 U.S. 463, 480 (1976)). On the other hand, the plain-view doctrine "authorizes seizure of illegal or evidentiary items visible to a police officer who has access to the object, has some prior Fourth Amendment justification, and who has probable cause to suspect the item is connected with criminal activity." *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (citation omitted). It cannot be said that the incriminating nature of these items was immediately apparent given that the officers were purportedly searching for evidence that Ferguson illegally possessed a firearm. *See Shamaeizadeh*, 338 F.3d at 554 (stating that to invoke plain-view doctrine, the

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[2] Ferguson does not contest the seizure of the baggie of marijuana or the shotgun and rifle rounds beyond his general challenge to the validity of the search warrant.

evidence must be in plain view and of an "immediately incriminating" character). Again though, the introduction of this evidence at trial was harmless.

Notwithstanding, as discussed below, we find that the $5,026 was improperly forfeited.

C. Motion in Limine

Ferguson challenges the district court's ruling denying his request to exclude the baggie of marijuana and the cash. He complains that there was nothing relevant about a personal-use amount of marijuana or $5,026 in assorted coins and one-dollar, two-dollar, and five-dollar bills found in a water-cooler sized plastic jar. The district court acknowledged that the marijuana was found after the time frame of the conspiracy and was only a small amount, but stated that "Ferguson's access to the marijuana remains relevant to the charges against him," and further noted that large amounts of cash are often associated with drug trafficking.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence which is not relevant is not admissible. Fed. R. Evid. 402. A district court's evidentiary rulings as to relevance and unfair prejudice are reviewed for abuse of discretion. *United States v. Whittingon,* 455 F.3d 736, 738 (6th Cir. 2006). Furthermore, an erroneous admission of

evidence that does not affect the substantial rights of a party is deemed harmless. *Id.* (citations omitted).

Ferguson cannot show any prejudice as to the marijuana, because the jury returned a special verdict finding him not guilty of the marijuana count. So any error was harmless. The same is true for the cash, given the ample evidence of Ferguson's guilt. However, as for the cash, the lack of relevance at trial is relevant to the question of forfeiture, as discussed below.

D. Sufficiency of the Evidence

Ferguson argues that the evidence did not establish a conspiracy between himself and the drug dealers that he supplied. He further complains that there was no proof that the substance he provided to Shanklin on February 1, 2006, was cocaine.

A jury's verdict will be upheld if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Circumstantial evidence will suffice, and "such evidence need not exclude every possible hypothesis except that of guilt." *United States v. Jackson*, 55 F.3d 1219, 1225 (6th Cir. 1995). All inferences are drawn in favor of the jury's verdict. *United States v. Maliszewski*, 161 F.3d 992, 1006 (6th Cir. 1998).

To sustain a drug conspiracy conviction under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt that (1) there was an agreement to violate drug laws; (2) the defendant had knowledge of and intent to join the conspiracy; and (3) he participated in the conspiracy. *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007).

Shanklin testified that illegal drug dealing was occurring at the barber shop. The conspiracy started with marijuana and escalated to cocaine and crack cocaine. Shanklin stated that he received cocaine from Ferguson on three occasions – twice in January 2006 and once in February 2006. Shanklin described how, on February 1, 2006, Ferguson instructed Shanklin to meet him at a parking lot to exchange the cocaine that Ferguson was fronting him, and to call Ferguson at a friend's house after Shanklin had obtained the money from an individual named Derrick Lander. Surveillance cameras captured Shanklin's delivery of the cocaine to Lander, Lander's delivery of a box with $12,000 to Shanklin in return, and Shanklin's delivery of the box to Ferguson's vehicle.

From the mere fact that the box contained a sizeable sum of money, $12,000, it can easily be inferred that Ferguson was paid for cocaine and not something else. In fact, a dealer named Antonio Wilson testified that Ferguson charged more for his cocaine than other dealers because it was of a higher quality.

Cox testified that Ferguson fronted him cocaine with the understanding that Cox would pay Ferguson once Cox sold the cocaine. And, the surveillance cameras in the barber shop recorded a conversation between Cox and Shanklin discussing Ferguson as Cox's supplier.

In short, the evidence was sufficient to support the jury verdicts on Counts 1 and 18.

E. Sentencing Disparities

At sentencing the Government recommended a sentence of thirty years to life imprisonment. The district court questioned "whether Ferguson was the top man in the organization." The district court considered the sentences of the other codefendants in the case, noting that the next lowest sentence imposed was 240 months for Colin Carpenter. To avoid disparity between the sentences of all the codefendants, the district court granted Ferguson a variance, and sentenced him to 300 months (25 years) in prison.

Although the district court granted Ferguson a variance, Ferguson claims that it was insufficient because the district court did not consider the possibility that his codefendants might receive sentence reductions. Because he failed to present this issue below at any point, even after the district court asked if the parties had any objections to the sentence imposed, we review for plain error only. *See United States v. Vonner*, 516 F.3d 382, 385-86 (6th Cir. 2008) (en banc); *see also United States v. Bostic*, 371 F.3d

865, 871 (6th Cir. 2004). Plain error is "(1) error (2) that was obvious or clear, (3) that affected defendant's substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *Vonner*, 516 F.3d at 386 (citation and internal quotation marks omitted).

Specifically, Ferguson contends that the district court should have considered that his codefendants, who pleaded guilty to crack cocaine offenses, would be eligible for a two-level reduction under the Sentencing Commission's retroactive amendment to the Drug Quantity Table in U.S.S.G. § 2D1.1(c). However, as this Court has noted, "[s]ubsection 3553(a)(6) is concerned with *national* disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct." *United States v. Houston*, 529 F.3d 743, 752 (6th Cir. 2008) (internal quotation marks and citation omitted), *cert. denied*, 129 S. Ct. 2764 (2009). Thus, there was no error, let alone plain error, affecting Ferguon's [sic] substantial rights.

F. Notice of Forfeiture

Ferguson objects to the forfeiture of his interest in the $5,026, claiming that he did not receive notice that it was subject to forfeiture. He also argues that there was no nexus between the cash and his drug crimes.

1. Notice

Ferguson claims that he did not receive notice that the $5,026 was subject to forfeiture because the superseding indictment does not set it out specifically. This argument is raised for the first time on appeal and reviewed for plain error only.

Federal Rule of Criminal Procedure 32.2(a) states that "[a] court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute." Fed. R. Crim. P. 32.2(a).[3]

Count 28 of the Superseding Indictment meets this requirement. It states that the United States sought forfeiture of "any and all property constituting, or derived from, proceeds [Ferguson] obtained, directly or indirectly, as a result of the said offenses." Furthermore, it is obvious that Ferguson knew that the Government sought forfeiture of the cash. The Government's trial memorandum restated this intention to obtain forfeiture. Post-conviction, Ferguson

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[3] Rule 32.2 was amended on December 1, 2009. The amendments do not affect our analysis of this issue. In fact, the Advisory Committee notes advise that the amendment to subdivision (a) "makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought." Fed. R. Crim. P. 32.2, Advisory Committee Notes to 2009 Amendments.

filed a document entitled "Motion for Return of $5,026."

Ferguson's reliance on *United States v. Jones*, 502 F.3d 388 (6th Cir. 2007), is misplaced. *Jones* involved the government's attempt to forfeit real property and a mobile home based in part on the defendant's involvement in a conspiracy to distribute marijuana. The indictment sought to forfeit simply "3.2 acres of real property in Laurel County, Kentucky." This Court held that the mobile home on the property was not subject to forfeiture because it was not listed in the indictment, and the government failed to establish a nexus between the criminal activity charged in the indictment and the real property. *Id.* at 394.

2. Nexus

Property may be subject to forfeiture when it is the direct or indirect proceeds of the crime of conviction. 21 U.S.C. § 853(a)(1). The property must bear a "sufficient nexus" or "substantial connection" to the underlying offense. *United States v. Smith*, 966 F.2d 1045, 1055 (6th Cir. 1992). *See also* Fed. R. Crim. P. 32.2(b)(1) (stating that when the government seeks forfeiture of specific property, "the court must determine whether the government has established the requisite nexus between the property and the offense"). The government has the burden of proving forfeiture by a preponderance of the evidence. *Jones*, 502 F.3d at 391; *Smith*, 966 F.2d at 1052.

Neither party in this case requested a jury determination of forfeiture during trial. After trial, but before sentencing, Ferguson and his wife jointly moved for a return of the cash seized from the Mt. Lebanon Road residence under Rule 41(g) of the Federal Rules of Criminal Procedure. The court denied this motion and ordered the forfeiture of the cash pursuant to 21 U.S.C. § 853(n). However, the forfeiture was not discussed at sentencing and was not included in the final judgment as required by Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure.

In their motion, the Fergusons noted that the Government did not produce any evidence during the suppression hearing or at trial linking this money to Ferguson's drug-trafficking activities, and that the Government failed to seek civil or criminal forfeiture during trial. Rather, the Government had expressed its intention to seek a fine against Ferguson in the exact amount of the seized cash. In response, the Government conceded that "due to oversight the United States did not seek a jury verdict on the forfeiture count," but claimed that the money was nevertheless subject to criminal forfeiture. The Government argued that it also had the right to retain the money, as evidence, until the conclusion of the criminal proceeding. Finally, the Government reiterated its intention to seek imposition of a fine in the amount of the seized cash.

The district court denied the Fergusons' motion without an evidentiary hearing and *sua sponte*

ordered the seized money forfeited. The district court reasoned as follows:

> The Presentence Investigation Report indicates that Ferguson has assets $10,500. His 2005 income was $12,000. It is incongruous that Ferguson would have such a large amount of cash on hand considering his level of income and his holdings. Recognizing that large quantities of cash are often associated with drug trafficking, and considering Ferguson's convictions on Counts One and Eighteen of the Superseding Indictment, this Court finds that the Government has established the requisite nexus between the $5,026 and the offense.

The problem with the district court's reasoning is that the Government never actually sought forfeiture and therefore never offered these arguments and evidence in support. Indeed, the only relevant evidence, presented by Ferguson at the suppression hearing, established the *lack* of a nexus. Special Agent Hayes testified at the suppression hearing that the approximately $5,000 in cash discovered at the Mt. Lebanon Church Road residence was in a plastic jug in the master bedroom. Ferguson's wife testified that the money was from savings and gifts from family members. She said she and Ferguson kept it in "a plastic oversized bottle that had a plastic top that was a bank," with a slit in the top, and that it held "ones, twos and fives and change." Ferguson's mother testified for the defense that "this was like a community jar, that they put ones, twos, fives in there as

they got them over about a three to five-year period." Agent Hayes testified that the denominations of the cash in the plastic jug were not consistent with the quantities of cocaine Ferguson was dealing with.

Although the presence of a not insubstantial amount of cash could perhaps raise an inference of illegality given Ferguson's modest legitimate income, the Government did not offer any evidence to support such an inference. Instead, the undisputed sworn testimony in the record supported Ferguson's alternative explanation for the money. The location of the money in the piggy-bank-like plastic jug and the small denominations of cash, saved over a three-year period, suggest that the money was not obtained by drug trafficking. Furthermore, given the lack of evidence that Ferguson engaged in drug trafficking out of the Mt. Lebanon Road residence, the Government was obliged to produce some evidence linking the seized cash to Ferguson's drug-trafficking activity. In sum, then, the money was not properly subject to criminal forfeiture because the Government failed to meet its burden of establishing a nexus between the seized cash and Ferguson's convictions.

We therefore reverse the district court's forfeiture of the cash and order it be returned to the Fergusons because the money was both improperly seized and improperly forfeited.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of conviction and sentence, but REVERSE the order of forfeiture. The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

United States District Court
Western District of Kentucky
BOWLING GREEN DIVISION

UNITED STATES OF AMERICA

v.

COREY FERGUSON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1:06-CR-24-03-R

Counsel For Defendant:

Keith E. Kamenish, retained counsel
Shane A. Young, retained counsel

Counsel For The United States:

Jo E. Lawless, Asst. U.S. Attorney

Court Reporter: **Regina McBride**

THE DEFENDANT:

☐ pursuant to plea agreement

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ **Was found guilty by a jury on June 12, 2007 on Counts 1 and 18 in the Superseding Indictment after a plea of not guilty**

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL – SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through 7 Of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) (Is) (are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

IT IS FURTHER ORDERED that the presentence report be returned to the United States Probation Office, and shall be available to counsel on appeal. **IT IS FURTHER ORDERED** that the sentencing recommendation be returned to the United States Probation Office, and shall not be available to counsel on appeal.

May 5, 2008
Date of Imposition of Judgment

May 9, 2008

/s/ Thomas B. Russell [LOGO]
Thomas B. Russell, Judge
United States District Court

COUNTS OF CONVICTION

Title & Section Number(s)	Nature of Offense	Date Offense Concluded	Count
21 U.S.C. 846 and 21 841(b)(1)(B)(ii)	Conspiracy to Possess with Intent to Distribute 500 Grams or More of Cocaine	02/17/2006	1S
21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2	Distribution of Cocaine, Aiding and Abetting	02/1/2006	18S

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 300 months as to each of Counts 1 and 18 in the Superseding Indictment, which shall be served concurrently, for a total term of 300 months imprisonment.

☒ **The Court makes the following recommendations to the Bureau of Prisons:** That a facility be designated where Defendant may be

placed in a comprehensive drug treatment program and be placed to facility that is close to his family. [Handwritten Note Illegible]

☒ **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at A.m./p.m. on
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:.

- ☐ Before 2:00 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ As notified by the Probation or Pretrial Services Office.
- ☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 years as to each of Counts 1 and 18, which shall run concurrently, for a total term of 8 years.

The defendant shall report to the probation office in the district in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

☒ **The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of Each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other Acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a Felony, unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any Contraband observed in plain view by the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the Permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal Record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the Defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

14) The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic addiction or drug or alcohol dependency, which will include testing for the detection of substance use or abuse.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$ 0	$ 0

☒ **The fine and the costs of incarceration and supervision are waived due to the defendant's inability to pay.**

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal case (AO 245C)* will be entered after such determination.

☒ **Restitution is not an issue in this case.**

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order Or Percentage Of Payment

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be

subject to Penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the

☐ Fine and/or ☐ Restitution

☐ The interest requirement for the

☐ Fine and/or

☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $
Due immediately, balance due

☐ not later than , or

☐ in accordance with C, D, or E below); or

B ☐ Payment to begin immediately (may be combined with C, D or, E below); or

C ☐ Payment in *(E.g. equal, weekly, monthly, quarterly)* installments of $
Over a period of *(E.g. months or years)* year(s) to commence *(E.g. 30 or 60 days)* after the date of This judgment; or

D ☐ Payment in *(E.g. equal weekly, monthly, quarterly)* installments of $
Over a period of *(E.g. months or years)* year(s) to commence *(E.g. 30 or 60 days)* after Release from imprisonment to a term of supervision; or

E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release,

the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

No. 08-5712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COREY FERGUSON, Defendant-Appellant.	)	ORDER (Filed Sep. 23, 2010)

BEFORE: SUHRHEINRICH, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(3)

No. 10-1084

In the Supreme Court of the United States

COREY FERGUSON, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
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QUESTIONS PRESENTED

1. Whether the failure to disclose oral representations by the government to a cooperating witness entitled petitioner to a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972).

2. Whether the court of appeals correctly applied the harmless-error doctrine to the admission of evidence seized from petitioner's residence.

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In the Supreme Court of the United States

No. 10-1084

COREY FERGUSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is not published in the Federal Reporter, but is reprinted in 385 Fed. Appx. 518. The district court's memorandum opinion denying a new trial is unreported, but is available at 2008 WL 339635. The district court's memorandum opinion granting in part and denying in part petitioner's pretrial motion to suppress is unreported, but is available at 2007 WL 403586.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2010. A petition for rehearing was denied on September 23, 2010 (Pet. App. 40). The petition for a writ of certiorari was filed on December 20, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846 and 841(b)(1)(B)(ii); and distribution of 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 18 U.S.C. 2. Pet. App. 29. Petitioner was sentenced to 300 months of imprisonment, to be followed by eight years of supervised release, and ordered to forfeit $5026. *Id.* at 3, 29-31. The court of appeals affirmed the conviction and sentence but reversed the forfeiture order. *Id.* at 1-26.

1. In 2003, a task force of federal and local law enforcement officers began investigating suspected drug trafficking activity at a barbershop in Bowling Green, Kentucky. Pet. App. 1-2. During that investigation, the officers learned that petitioner was a major drug dealer in the area and was the supplier for one of the barbers. Mem. Op. 1 (filed Feb. 1, 2007) (2/1/07 Mem. Op.). The officers set up surveillance cameras both inside and outside the shop to capture evidence of drug activity. *Id.* at 1-2; Gov't C.A. Br. 4-5.

2. On May 3, 2006, a grand jury in the Western District of Kentucky returned a multi-count indictment charging petitioner and seven others with various narcotics-related offenses. Pet. App. 2. On the morning of May 15, officers went to a residence on Mt. Lebanon Church Road to execute a federal arrest warrant against petitioner. *Id.* at 11. They observed a vehicle associated with petitioner in the driveway and saw two pieces of

mail bearing petitioner's name in plain view in the vehicle. *Ibid.*; 2/1/07 Mem. Op. 2. The officers knocked on the door and announced their presence. *Ibid.* They heard music coming from inside and saw someone peer through the front-window blinds. *Ibid.* Nobody answered the door, however. *Ibid.* After waiting for approximately 45 minutes, the officers left to execute another arrest warrant. *Ibid.*

Shortly thereafter, state police received a call from a neighbor stating that a black male had left the residence in a red pickup truck. Pet. App. 11-13. A state trooper stopped the red pickup, in which petitioner was a passenger. *Id.* at 12; 2/1/07 Mem. Op. 3, 5. In a search incident to arrest, the trooper found a live 12-gauge shotgun shell in petitioner's front pants pocket. *Ibid.*

A state judge issued a search warrant for the Mt. Lebanon Church Road residence. Pet. App. 12. The warrant authorized officers to seize "12-gauge shotgun shells, a 12-gauge shotgun, and documentation regarding the purchase of a 12-gauge shotgun." 2/1/07 Mem. Op. 3. During the search, officers seized $5026 in cash, five shotgun shells, a baggie of marijuana, a safe-deposit key, various documents, four rifle rounds of ammunition, four surveillance cameras, and a JVC television. Pet. App. 12.

3. The grand jury issued a superseding multi-defendant indictment charging petitioner with one count of conspiracy to manufacture crack cocaine and to possess with intent to distribute crack cocaine, powder cocaine, and marijuana, in violation of 21 U.S.C. 846; one count of manufacturing crack cocaine, in violation of 21 U.S.C. 841(a)(1); and one count of distributing powder cocaine on or about February 1, 2006, in violation of 21 U.S.C. 841(a)(1). Pet. App. 1-2; Superseding Indictment

1-2, 10-11 (filed July 12, 2006) (Indictment). The indictment also sought forfeiture of the $5026 that officers had seized in the search. *Ibid.*

Before trial, petitioner moved to suppress the search of his residence. 2/1/07 Mem. Op. 3. Following an evidentiary hearing, the district court granted the motion in part and denied it in part. *Id.* at 1. The court first determined that the warrant was valid because "the discovery of [petitioner's] illegal possession of ammunition minutes after leaving the residence * * * established probable cause to believe additional evidence of his possession of firearms or ammunition would be found in that residence." *Id.* at 6. The court rejected petitioner's challenges to the affidavit supporting the warrant, observing that the affiant detective "had been involved in a year-long investigation of [petitioner] for drug trafficking"; was "aware of [petitioner's] two prior [felony] drug-trafficking convictions"; and believed, based on both his training and conversations with other officers, that firearms are generally associated with drug trafficking. *Id.* at 5-6.

The district court declined to suppress the television, cameras, cash, and safe-deposit key. 2/1/07 Mem. Op. 7-8. Although these items were not expressly listed in the warrant, the court determined that they fell within the Fourth Amendment's plain-view exception. *Ibid.* The court reasoned that the officers had probable cause to believe that the television and cameras "constituted a security system that police officers most typically see associated with drug traffickers" and that the cash and safe-deposit key were associated with the cash receipts of drug trafficking. *Id.* at 7. The district court suppressed, however, documents recovered in the search that were unrelated to firearms, concluding that the

officers lacked probable cause to believe the documents were incriminating. *Id.* at 6-8.

4. a. At trial, the government presented 12 witnesses during its case-in-chief, six of whom testified about their knowledge of petitioner's drug dealing. Mem. Op. 4 (filed Feb. 6, 2008) (2/6/08 Mem. Op.). "Of particular note, the jury heard testimony from co-conspirator Jerome Shanklin concerning a half-kilogram powder cocaine deal on February 1, 2006." *Ibid.*; see Pet. App. 7 (observing that Shanklin "testified that he received cocaine directly from [petitioner] three times—one half kilo and then one kilo in January and another half kilo on February 1, 2006"). Shanklin testified that on that date, petitioner directed that the two of them meet to exchange cocaine that petitioner was fronting to Shanklin and that Shanklin call petitioner once Shanklin's buyer had paid for the cocaine. *Id.* at 18. The jury also "viewed videotapes and cellular telephone records that corroborated Shanklin's testimony concerning the deal." 2/6/08 Mem. Op. 4; see Pet. App. 7. Surveillance footage from February 1, 2006, showed Shanklin selling approximately half a kilogram of cocaine, receiving a "large wad of money that he placed in a Nike shoe box," and later placing that shoe box into a black sport utility vehicle that petitioner had driven to the barbershop parking lot. 2/1/07 Mem. Op. 1-2; see Pet. App. 18; Gov't C.A. Br. 4, 18.

b. One of the government's other witnesses was co-defendant William Downey. Pet. App. 2; 2/6/08 Mem. Op. 3-4. Downey, unlike several other witnesses (including Shanklin), had no direct drug deals with petitioner, but interacted with him only through a middleman. Pet. App. 6-7; 2/6/08 Mem. Op. 3. Downey testified about two occasions in January 2006 when he and the middleman

purchased 12 ounces of powder cocaine from petitioner. Pet. App. 6-7; 2/6/08 Mem. Op. 3-4.

During Downey's direct examination, the government elicited testimony about the terms of his plea agreement. As a result of the government's filing an information pursuant to 21 U.S.C. 851, Downey faced a mandatory-minimum sentence of 20 years of imprisonment. 6/7/07 Tr. 20-22, 25. In exchange for Downey's cooperation, the government had agreed not to file a second Section 851 information that would have increased Downey's sentence to a mandatory minimum of life. *Id.* at 25-26. Downey agreed that no "promises or guarantees [were] made to [him] about what kind of sentence [he was] looking at," *id.* at 22, and that nothing in the agreement "suggests or promises or puts down on paper any kind of promise to consider or actually file any kind of motion with the Court to get [Downey] anything less than a 20-year sentence," *id.* at 26.

During cross-examination, Downey testified that he did hope to "get a 5K1 reduction" for substantial assistance to the government under Sentencing Guidelines § 5K1.1 and thereby receive a sentence below the mandatory-minimum term of 20 years of imprisonment. 6/7/07 Tr. 51; see *id.* at 52 (Downey agreeing with defense counsel that "when the government's holding your life in your hands, and you're looking at a potential of getting a 5K1 reduction, you're going to roll like that, correct?"). On redirect, Downey admitted that he did not want to testify but was doing so to fulfill his cooperation agreement; that even if he told the truth, he was not "going to get a better deal than what's in [his] plea agreement"; that "the best [he could] hope for is what's in that plea agreement"; and that the agreement did

not include any mention of a motion "asking the judge * * * to lower [his] sentence." *Id.* at 56-57.

c. The jury convicted petitioner of conspiracy to distribute between 500 grams and five kilograms of powder cocaine (a lesser-included offense of the first charge against him), in violation of 21 U.S.C. 846 and 841(b)(1)(B)(ii); and distribution of 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 18 U.S.C. 2. Pet. App. 3, 29. The jury acquitted petitioner on the count of manufacturing crack cocaine. *Id.* at 3. The district court also ordered the forfeiture of the $5026 seized during the search of petitioner's residence. *Ibid.*

5. About three months later, the trial prosecutor sent a letter to petitioner's counsel. Pet. App. 3; 06-00024 Docket entry No. 436 Attach. 4 (filed Dec. 20, 2007). She informed counsel that she had recently become aware, following Downey's sentencing hearing, that a prosecutor previously assigned to petitioner's case had informed Downey that Downey "would be considered for a sentence less than 20 years if he testified truthfully during any trial." Her "further investigation" of the matter had revealed, however, that "no specific promises or guarantees were made to Mr. Downey." *Ibid.*

Petitioner moved for a new trial, arguing that the government had violated the disclosure requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and had engaged in prosecutorial misconduct. Pet. App. 3; 06-00024 Docket entry No. 436 (filed Dec. 20, 2007). The district court denied the motion on the papers. Pet. App. 3; 2/6/08 Mem. Op.

As to the *Brady* claim, the district court concluded that petitioner had "failed to show that the evidence that

Downey was promised some consideration for truthful trial testimony created a reasonable probability that the outcome of the proceedings would have been different." 2/6/08 Mem. Op. 5. The court observed that Downey had said on cross-examination "that he was testifying because he hoped to get a 5K1 reduction." *Id.* at 4. The court also observed, among other things, that the government had called 11 other witnesses; that Shanklin's testimony was "[o]f particular note"; and that the jury had found petitioner guilty of the count "covering the February 1, 2006 transaction" about which Shanklin had testified. *Ibid.*

As to the prosecutorial-misconduct claim, the district court reasoned that "although the prosecutor's statements [during examination of Downey] may have been incorrect they did not concern a central issue in the case"; that the questioning on this issue was not "extensive"; that there was "no evidence that the remarks were deliberately made"; that the "evidence before this Court confirms that the prosecutor learned of the agreement for the first time at Downey's sentencing hearing"; and that, for reasons the court had discussed in connection with the *Brady* claim, "there was strong evidence against [petitioner] irrespective of Downey's testimony." 2/6/08 Mem. Op. 5-6.

6. The court of appeals affirmed petitioner's conviction and sentence, but reversed the district court's forfeiture order. Pet. App. 1-26.

a. As relevant here, the court of appeals first concluded that the district court did not abuse its discretion in denying a new trial. Pet. App. 4-10. The court recognized that petitioner would be entitled to relief under *Brady* and related cases if the government failed to turn over impeachment evidence and the evidence was ma-

terial—*i.e.*, there was a reasonable probability of a different trial outcome if the evidence had been disclosed. *Id.* at 4-5 (citing, *inter alia*, *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972), and *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995)). The government conceded that the cooperation agreement was impeachment evidence, see, *e.g.*, Gov't C.A. Br. 15-16, so the court of appeals addressed only the question of materiality. The court of appeals agreed with the district court that there was no reasonable probability that the trial outcome would have changed had the evidence been disclosed, because "Downey's reliability was not 'determinative of guilt or innocence.'" Pet. App. 6 (quoting *Giglio*, 405 U.S. at 154). The court noted that Downey was only one of 12 witnesses and, unlike several other witnesses, had not dealt directly with petitioner. *Id.* at 6-7. The court reasoned that "the closest to being characterized as a 'key witness'" was not Downey, but Shanklin, who had testified to multiple cocaine transactions, including the February 1, 2006, transaction that had been corroborated by videotapes and cellphone records. *Id.* at 7. Observing that the jury had found petitioner guilty of that February 1 transaction "as well as the conspiracy charge for that time period," the court concluded that "Shanklin's testimony supports the jury's verdict here." *Ibid.*

The court of appeals also rejected, for two independent reasons, petitioner's contention that a new trial was required because the government had knowingly relied on perjured testimony. Pet. App. 8-9. First, the court concluded that petitioner could not satisfy even the "relaxed standard" of materiality that it would apply to the knowing use of false testimony, under which it would grant a new trial if there were "any reasonable likelihood that the false testimony could have affected the

judgment of the jury." *Ibid.* For reasons it had already explained, "Downey was not the key witness," and Shanklin's testimony, in connection with other evidence, "easily supports the jury's verdict." *Id.* at 8. Second, the court found no indication that the trial prosecutor "*knowingly* used perjured testimony," observing that it was she who disclosed the information to petitioner. *Id.* at 9.

b. In addition to affirming the denial of the new-trial motion, the court of appeals also found no reversible error in the admission at trial of evidence obtained during the search of petitioner's residence. Pet. App. 11-16. The court stated that the validity of the search warrant was "problematic," noting that possession of ammunition by a felon does not violate state law; that the affidavit supporting the warrant had inaccurately stated that a neighbor had seen petitioner leaving the residence, when in fact the neighbor had said only that a black male had done so; that the affiant detective had not himself surveilled the residence; and that there was no direct evidence that petitioner dealt drugs out of the residence or kept firearms there. *Id.* at 13-14. But the court perceived no need actually to decide whether the warrant was valid. *Id.* at 14. "Any error," it recognized, "is subject to harmless-error review." *Id.* at 13 (citing *United States* v. *Garcia*, 496 F.3d 495, 512 (6th Cir. 2007) (citing *Chapman* v. *California*, 386 U.S. 18, 22 (1967)). "Given the overwhelming evidence of [petitioner's] guilt on the cocaine charges," it continued, "any error was harmless here." *Id.* at 14.

The court of appeals also concluded that the seizure of certain items not mentioned in the warrant—the television, cameras, safe-deposit key, and camera—was not justified under the plain-view exception, because it

"cannot be said that the incriminating nature of these items was immediately apparent given that the officers were purportedly searching for evidence that [petitioner] illegally possessed a firearm." Pet. App. 15. "Again, though, the introduction of this evidence at trial was harmless." *Id.* at 16.

ARGUMENT

Petitioner renews (Pet. 11-31) his contentions that the district court abused its discretion in denying a new trial and committed reversible error by admitting fruits of the residence search into evidence. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioner's fact-bound arguments regarding the application of settled law to the facts of his case do not warrant further review. Sup. Ct. R. 10.

1. Petitioner first contends (Pet. 19-25) that he is entitled to a new trial based on the government's failure to disclose the oral representations it had made to Downey before trial. That contention lacks merit.

The Due Process Clause forbids the prosecution from suppressing material evidence that is favorable to the defendant. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Due process also forbids the government from obtaining a conviction using a government witness's false testimony about promises made to him in exchange for his testimony. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 153 (1972). As petitioner acknowledges (Pet. 20, 22-23), to prevail on a *Brady* or *Giglio* claim, a defendant must show, among other things, that any evidence withheld by the prosecution would have been material at trial. *United States* v. *Agurs*, 427 U.S. 97, 103-106

(1976). Both the district court and the court of appeals correctly determined that petitioner did not make that showing here. Pet. App. 7-9; 2/6/08 Mem. Op. 5-6.

To the extent that petitioner suggests (Pet. 16-23) that the court of appeals applied the wrong materiality standard, that suggestion lacks merit. The court expressly assessed, and rejected, petitioner's arguments under both of the prejudice standards petitioner now advances. Petitioner states that, for purposes of a *Brady* claim alleging suppression of evidence, such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Pet. 20 (citing *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). The court of appeals applied that exact standard and concluded that petitioner could not meet it. Pet. App. 4-5 (new trial warranted under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)). Petitioner also states that, for purposes of a *Giglio* claim alleging knowing presentation of false testimony, such testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Pet. 22-23 (citation omitted). The court of appeals applied that exact standard as well and concluded that petitioner could not meet it, either. Pet. App. 8 (new trial warranted when prosecution knowingly uses perjured testimony "if there is any rea-

sonable likelihood that the false testimony could have affected the judgment of the jury"); see *id.* at 9.[1]

To the extent that petitioner's argument simply reflects disagreement with how the courts below weighed the evidence (Pet. 21-24), that fact-bound argument does not meet the standards for this Court's review. See Sup. Ct. R. 10. The argument lacks merit in any event, as the court correctly concluded that petitioner could not meet even what it characterized as the more "relaxed standard" of showing a "reasonable likelihood" that the jury's judgment was affected. Pet. App. 8. Petitioner was convicted on counts of cocaine distribution "[o]n and about February 1, 2006" and conspiracy to distribute cocaine for a period including that date. Indictment 1-2, 10-11; Pet. App. 29. As the district court and the court of appeals both recognized, Shanklin's testimony about a half-kilogram drug transaction on that date, in combination with videotape and cellphone-record corroboration, established petitioner's guilt on both counts. Pet. App. 7; 2/6/08 Mem. Op. 4.

Petitioner speculates (*e.g.*, Pet. 21-22) that the jury must have relied on Downey's testimony rather than Shanklin's, asserting that the jury disbelieved Shanklin's testimony about certain acquitted conduct. That argument overlooks the close correspondence between Shanklin's testimony and the charged conduct; the

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[1] Petitioner briefly asserts (Pet. 16) that the decision creates an intra-circuit conflict with *Bell* v. *Bell*, 460 F.3d 739 (6th Cir. 2006). The *Bell* opinion, however, was vacated on rehearing en banc, see *Bell* v. *Bell*, 512 F.3d 223 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 114 (2008), and the court of appeals in this case cited the en banc opinion in its discussion of the proper legal standard. See Pet. App. 5. In any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

lesser relevance of Downey's testimony about January 2006 transactions that did not directly involve petitioner; the independent evidentiary force of the surveillance tapes; and the conclusions of both lower courts (including the district court, which heard all of the trial evidence directly). See Pet. App. 6-7; 2/6/08 Mem. Op. 4; see *Agurs*, 427 U.S. at 112-113 ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."). Petitioner's argument also wrongly assumes that the jury, which had already heard evidence that Downey had a sentencing-related incentive to cooperate, see pp. 6-7, *supra*, would have viewed Downey in a substantially different light had it been aware of an additional such incentive. *See United States* v. *Morris*, 498 F.3d 634, 640 (7th Cir. 2007) ("Although the jury might have recognized the potential for an additional reduction in [the witness's] sentence as a marginally greater incentive for [the witness] to tailor his testimony in favor of the government, the information that the jury had before it was not different enough to lead us to believe that there was a 'reasonable likelihood' that the result would have changed."). No further review is warranted.[2]

2. Petitioner also contends (Pet. 27-29) that the court of appeals' application of the harmless error standard to the admission of evidence seized from his resi-

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[2] Petitioner's list of questions presented also includes "[w]hether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment." Pet. i. The body of the petition mentions this issue only as "an interesting question" raised in the vacated panel opinion in *Bell* v *Bell*. Pet. 16; see note 1, *supra*. Petitioner does not explain how the question is presented in this case.

dence conflicts with *Chapman* v. *California*, 386 U.S. 18 (1967). That contention is likewise without merit.

The court of appeals' decision makes clear that it was applying the *Chapman* standard. In reciting the principles governing review of a district court's denial of a suppression motion, the court recognized that "[a]ny error is subject to harmless-error review." Pet. App. 13. In support of that proposition, it cited *United States* v. *Garcia*, 496 F.3d 495, 512 (6th Cir. 2007), and observed that *Garcia*, in turn, relies on *Chapman*. Pet. App. 13; see *Garcia*, 496 F.3d at 506 ("Before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt.") (quoting *Chapman*, 386 U.S. at 24) (brackets omitted). The court of appeals concluded that "any error was harmless here" in light of the "overwhelming evidence of [petitioner's] guilt on the cocaine charges." Pet. App. 14; see *id.* at 16 (similar conclusion for seizure of items not listed in warrant). Petitioner's fact-bound disagreement with the court of appeals' evaluation of the evidence lacks merit for reasons previously discussed, see p. 13, *supra*, and would not warrant this Court's review in any event.[3]

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[3] Review is particularly inappropriate because the court of appeals declined to address the validity of the warrant, Pet. App. 14, and the government would maintain that the admission of the seized evidence at trial did not violate the Fourth Amendment in the first place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-1084

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In The

Supreme Court of the United States

COREY FERGUSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether there is a reasonable possibility that when the staff lawyers in a prosecutor's office have the burden of letting the left hand know what the right hand is doing or has done in violation of *Brady* and *Giglio*, require a new trial where the Government failed to disclose a § 5k1.1 cooperation agreement of a key witness during trial, in which misleads the jury can be said with confidence that the jury's verdict would have been the same if the jury was made aware of the witness's false testimony.

2. Whether using only the words (harmless error) satisfies Article VI of the United States Constitution under *Chapman v. California*, wherein this Supreme Court commanded, that "to determine whether the error was harmless under *Chapman*" the question this Court must ask is whether, absent the improperly admitted [evidence], it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

3. Whether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment.

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STATEMENT

On pages 5-10 in the Government's brief, they simply speculate about the testimony regarding William Downey, with the proposition that Downey was not the key witness, and Shanklin's testimony in connection with other evidence easily supports the jury's verdict. Nevertheless, a complete review of the trial transcripts indicates otherwise. For instance, during cross examination, William Downey testified that he kept cash in a "Nike" shoe box. The testimony was surely comparable to codefendant Shanklin's February 1, 2006, transaction. Furthermore, Downey agreed with the Government that using shoe boxes "may" or "may not" be some kind of tool of the trade for drug traffickers to move money around in.

More to the point, Ms. Lawless neatly provided Downey with an editorial comment, urging "it looks kind of innocent at least if you've got a shoe box sitting over somewhere? People may or may not pay that much attention to it, would you agree with that?" Downey answered: "YES". Consequently, there is absolutely no reason to believe that Downey's neatly designed testimony did not advance the jury's belief that Ferguson used shoe boxes for the movement of money and drugs. Also, Ms. Lawless' editorial style of questioning Downey reinforced his testimony, likewise it reinforced the testimony of Detective Sutter regarding the illegally shown video of the search of Ferguson's home, which was admitted into evidence for the jury's consideration.

In addition, Downey testified that his surveillance equipment was operational for protection against intruders such as the police. Surely, Ms. Lawless' line of questioning Downey, together with his answers to her definitions, gave answers to the jury that Ferguson was at least a powder cocaine dealer and he used the shoe boxes and illegally seized surveillance equipment taken from his home to advance security on the drugs and money derived from such activity.

Furthermore, during redirect, Ms. Lawless stated on the record that the best deal Downey could only hope for was what is in the plea agreement. In addition, she assured the jury, court and defense, that there was no promise of a 5k1.1, in Downey's plea agreement or motion asking Judge Russell to lower his sentence. Subsequently, Ms. Lawless expressly admitted to the jury that the best Downey could hope for was the "20 year sentence". Of course, there is absolutely no basis to believe that the jury did not consider beyond a reasonable doubt that the Government had not allowed Downey to testify falsely about the plea agreement.

Unfortunately, the Government had a hinged undisclosed agreement that substantiated that the prosecutor's office had in fact made a promise for a 5k1.1 motion to Downey, prior to his testimony, that was never revealed to the jury or defense during trial. Moreover, during Ms. Lawless' closing statement, she informed the jury that they have the drugs that were seized from the Downey residence, and the testimony

that they heard about Mr. Downey. Surely, the drugs seized from Downey was the only powder cocaine produced regarding count (1) of the element to distribute a mixture or substance containing a detectable amount of cocaine, which the jury convicted Ferguson of, beyond a reasonable doubt. Additionally, Ms. Lawless urged all of the acts of Ferguson we submit to you indicate consciousness of guilt. In addition, not only did Ms. Lawless embrace more than the fate of Downey's connection with Ferguson, she also reminded the jury that Ferguson and Downey may not get along, but they are going to do business because it is to each other's best interest to make money to sell more drugs and to move it along. Surely, her closing statements regarding Downey's testimony were pertinent components for each juror to consider independently, beyond a reasonable doubt, that Ferguson was a powder cocaine dealer.

Of course, Downey's false testimony deprived Mr. Kamenish of his duty to effectively cross examine him and prepare an adequate closing statement regarding his incentive to testify. In addition, his duty to effectively cross examine Downey and provide an adequate closing statement on behalf of his client was exacerbated by the Government's decision not to bring to the attention of the jury that the Government had in fact made an agreement with Downey prior to trial. Following Mr. Kamenish's closing statement, Ms. Lawless provided her rebuttal statement urging the jury to think about all of the

evidence that has been introduced to them and to find Ferguson guilty on all the charges.

Following Ms. Lawless' rebuttal statement, the Court provided and explained twenty-nine instructions to the jury. Based on the jury instructions, there is no reason to believe that the jury found Ferguson guilty beyond a reasonable doubt absent the testimony of Downey and all of the money and items seized from Ferguson's home. (A copy of the jury instruction is attached as App. "E" 5-141-171). For instance, instruction 16 allowed the jury to consider a reduced punishment in exchange for cooperation (App. "E" 5-156).

Of course, the Court instructed the jury that they should consider this testimony with more caution than the testimony of the other witnesses, and to consider whether the testimony may have been influenced by the Government's promise. The Court said "do not convict the defendant based on the unsupported testimony of such a witness, standing alone unless you believe the testimony beyond a reasonable doubt." This instruction absolutely supported the jury's verdict on behalf of Downey, because there was no reason for the jury to consider any reduced punishment against Downey in exchange for his testimony against Ferguson; unlike Shanklin and Cox, Downey testified that he was not testifying on behalf of a 5k1.1, promise of reduced punishment. Furthermore, had the Government not been allowed to present to the jury the barred Title III, interception of oral communications, including

the video recordings, without a showing of good cause before a Judge of competent jurisdiction.[1] Shanklin's and Cox's testimony would most definitely be standing alone.

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[1] The Government briefly asserts (Gov's. Brief page 5), the jury also viewed videotapes and cellular telephone records that corroborated Shanklin's testimony concerning the deal. Unfortunately, according to Chief Judge John G. Heyburn, II, the recordings were to be sealed and the seal verified by the signature of the Court: That said recording shall be protected from editing or alteration; that except as provided by § 2517 of Title 18 U.S.C. the contents of said recording shall be disclosed only upon order of this Court. (Id. App. "D", Court order filed under seal.) Of course, it is undisputed that the Government failed to comply with this order. There is no motion of good cause shown filed and no Court order unsealing the video recording. As a matter of fact, according to Attorney Kamenish, he reviewed all of his files and documents in detail. He has not been able to locate the Government's motion to unseal the wiretap application. (Id. Appendix "F").

In addition, Mr. Kamenish said "he was unable to locate any orders signed by Judge Russell, unsealing the electronic surveillance applications and discs." (Id. App. "G"). Unfortunately, the Government did not follow proper procedure and used the Title III wire communication in violation of well established law in the Sixth Circuit See: *United States v. Abraham*, 541 F.2d 624, (6th Cir. 1976). Of course, this Court, in reviewing a Federal Court of Appeals' decision, may in appropriate circumstances, consider issues not present in jurisdictional statement or petition for Certiorari, and not presented in Court of Appeals. *Vance v. Terraza*, 444 U.S. 252 (1980).

ARGUMENT

1. On (page 11 of the Government's Brief) the Government's proposition that petitioner's fact-bound arguments regarding the application of settled law to the facts of his case do not warrant further review is far-fetched and not supported by the Sixth Amendment, trial transcript, or their application of settled law to the facts of this case. In *Demarco v. United States*, 415 U.S. 499 (1974), this Court held unquestionably, had there been a promise to the witness prior to his testimony, *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959) would require reversal of petitioner's conviction. See also *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) holding like the majority of our sister circuits, we conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness. A deal is a deal-explicit or tacit. There is no logic that supports distinguishing between the two. The dissent in *Bell* illustrates the importance of disclosing a tacit agreement. [The requirement that] prosecutors disclose tacit agreements is undoubtly the correct result, as the same policies justifying the disclosure of explicit agreements also compel the disclosure of tacit agreements. Like explicit agreements, tacit agreements are likely to be relevant to credibility, and therefore should be disclosed to the jury. Indeed, tacit agreements may be more likely to skew the witness' testimony. In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a witness is

instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the more valuable his reward. The threat of incorrect jury verdicts is further increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony . . . Likewise the prosecutor can argue to the jury that the witness is testifying disinterestedly, which artificially increases the witness' credibility – artificially, that is (560 F.3d 1187) because the premise of the argument is false. *Bell v. Bell*, 512 F.3d at 244-45 (Clay, J., dissenting). Furthermore as the Court said in 1952, the use of informers . . . may raise serious questions of credibility. *Robinson v. Mills*, 592 F.3d 730 (6th Cir. 2009) citing on *Lee v. United States*, 343 U.S. 747, 757 (1952). Indeed, jurors often have a negative predisposition toward informants. "Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who 'sell out' and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable . . . " Stephen S. Trott, Words of Warning for Prosecutors using criminals as witnesses, 47 Hastings L.J. 1381, 1385 (1996); see also *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (favorably citing Trott, Words of Warning, supra). Of course, the Government is free to reward witnesses for their cooperation with favorable treatment in

pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witness prior to the testimony, *Ragheed Akrawi v. Booker*, 572, F.3d 252 (6th Cir. 2009) (quoting *Shazza v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003). However, as this Supreme Court has noted, cross-examination is the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

Based on all of the above authorities cited, forbidding prosecutors from making false representations concerning information within their possession furthers *Brady*'s goal of fair trials, and is consistent with the special role played by the American prosecutor in the search for truth in criminal trials.[2] *Banks*, 540 U.S. at 696 (quoting *Strickler*, 527 U.S. at 281).

Furthermore, the Government's reliance on *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) is wholly misplaced. For instance, the

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[2] Downey received his 5k1.1 promise from the same (AUSA), Ms. Lawless, who said she was not aware of any promise of a 5k1.1 with her office during trial. Subsequently, the Court indulged both Ms. Lawless and Downey's false testimony and awarded Downey two years off of his twenty year sentence for falsely testifying. Interestingly, the Court said "we will seal the part that lists the facts that warrant the government's motion for downward departure." (Id. App. "H" page 3). Of course, this Court has the authority to unseal the part that lists the facts that warrant the Government's motion for a downward departure for Downey's false testimony. See *United States v. Nixon*, 417 U.S. 960 (1974).

conflict in the Sixth Circuit Court of Appeals, including other circuits mentioned involves, who is being bound by the *Brady*, *Giglio* and *Chapman* standards handed down by this Court as the supreme law of the land, and who is not; as required by the supremacy clause. Under the supremacy clause, public officials have an obligation to follow the constitution even in the midst of a contrary directive from a superior or in a policy, *Kennedy v. City of Cincinnati,* 595 F.3d 327 (6th Cir. 2009). In addition, when called upon to construe and apply provisions of the constitution, the Supreme Court must look not merely to its language, but to its historical origin, and to the decisions of the Supreme Court in which its meaning and scope of its operation have received deliberate consideration. *Missouri v. Illinois,* 180 U.S. 208, 45 L.Ed. 497 (1901). For those reasons, this Court should answer the three questions on page one of the Petitioner's petition.

2. The Government urges that the Court of Appeals applied the *Chapman* standard. In addition, the Government said *United States v. Garcia*, 496 F.3d 495, 512 (6th Cir. 2007) can be used as a substitute for the *Chapman* standard and the word overwhelmingly satisfies beyond a reasonable doubt. Nevertheless, the Government's mischaracterization of the *Chapman* standard is even more egregious in light of the Courts of Appeals consistent interpretation of *Chapman*. Of course, unlike in Ferguson's case, in the following cases Judges Suhreinrich and Cole applied the proper *Chapman* standard. See *Dejesus v. Lafler,* 227 Fed. Appx. 594 (6th Cir. 2008); *U.S. v. Valentine*, 70 Fed. Appx. 314 (6th Cir. 2003); *U.S. v.*

Bond, 29 Fed. Appx. 241 (6th Cir. 2002); *Wilson v. Mitchell*, 498 F.3d 491 (6th Cir. 2007); *U.S. v. Kone*, 307 F.3d 430 (6th Cir. 2002). In each of these cases the panel clearly explained that before a Federal Constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Citing *Chapman v. California*, 386 U.S. 18, 24. Furthermore, the *Chapman* standard requires the beneficiary (not the Judges) of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990).

In *U.S. v. Lall*, 607 F.3d 1277 (11th Cir. 2010) the panel held in order to find that an error was harmless on direct appeal, "we must declare a belief that it is harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 the panel explained that the nature of Lall's statements and the physical evidence taken from his bedroom make it impossible to conclude that their admission was harmless beyond a reasonable doubt. More to the point, according to this Court in fashioning a harmless-constitutional-error rule, "we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." According to this United States Supreme Court in *Chapman* the Federal rule emphasizes substantial rights as do most others. The California Constitutional rules emphasize a

> miscarriage of justice, but the California Courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the Court's view of overwhelming evidence. In the case at bar the Government's fact-bound disagreement with the *Chapman* standard urges this Court to treat the proper standard as a chameleon in cases. In addition, the words "harmless error" does not satisfy Article VI of the United States Constitution's supremacy clause, and using the words "overwhelming evidence" runs afoul of the words beyond a reasonable doubt, according to the *Chapman* Constitutional Standard.

At present, as all the testimonies and jury instructions show, Downey's testimony and seized evidence supported the guilty verdict, beyond a reasonable doubt, not Shanklin's or Cox's. Therefore, this Court should not squint narrowly at the petitioner's three questions to avoid granting this writ, or allow a bizarre extension of *Brady*, *Giglio*, and *Chapman* on the faulty premises prescribed by the Court of Appeals and Solicitor General.

CONCLUSION

The brakes were applied to the *Chapman's* standard, and the, *Brady* and *Giglio* requirements through the panel's about-face interpretation, so its uniform motion was changed. In addition, the *Chapman* standard, should not be treated as a chameleon magnet cited through other cases which are then "dipped" into a case such as this one: with

the proposition that using only the words "harmless error" satisfies Article VI of the United States Constitution, without declaring that absent the improperly admitted "evidence", it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty.

Therefore, based upon all the false testimony of Downey, and the illegally seized evidence, that was admitted into evidence without the jury being made aware of the situation there is absolutely no reason to believe that the jury which was previously empanelled in this case, would have independently found Ferguson guilty beyond a reasonable doubt, in a case hedged and hinged on convicts, liars, drug users and deal takers, absent the false testimony of Downey and the illegally seized evidence, had the jury been made aware of this information during trial. Surely, the jury properly followed the jury instructions.

Wherefore, based upon all of the above reasons as well as the petitioner's previous reasons this Court should grant this writ in favor of the public's best interest.

Respectfully submitted,

This the 14th day of June 2011

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January 31, 2011

Corey Ferguson, #09796-033
Federal Correctional Institution
P. O. Box 6001
Ashland, KY 41105

Dear Corey,

Thank you very much for your letter dated January 27, 2011. Per your request, enclosed find the copy of the electronic surveillance application, and an order signed by Judge Heyburn. Please note that Judge Heyburn signed the electronic surveillance order on January 24, 2006. In addition, please find enclosed the electronic surveillance termination order signed by Judge Heyburn on February 23, 2006.

I have reviewed all the documents in my possession I was unable to locate any orders signed by Judge Russell unsealing the electronic surveillance applications and discs.

If you need anything else, do not hesitate to contact me.

Very truly yours,

/s/ [Illegible]
Keith E. Kamenish

KEK:cap

Enclosures

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March 24, 2011

Mr. Corey Ferguson, #09796-033
Federal Correctional Institution
P. O. Box 6001
Ashland, KY 41105

Dear Corey,

I have reviewed all my files in detail. I have not been able to locate the government's motion to unseal the wiretap applications.

Very truly yours,

/s/ Keith E. Kamenish
Keith E. Kamenish

KEK:lcf